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In The

Supreme Court of the United States

October Term, 1969

No. 85

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., and DATA SYSTEMS, INC.,
Petitioners,

vs.

WILLIAM B. CAMP, Comptroller of the Currency of the United States, and AMERICAN NATIONAL BANK AND TRUST COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE PETITIONERS

MILTON R. WESSEL
425 Park Avenue
New York, New York 10022
BERT M. GROSS and
FELIX M. PHILLIPS
900 Farmers & Mechanics Bank Bldg.
Minneapolis, Minnesota 55402
Attorneys for Petitioners

Northwest Brief Printing Co., 222 S. Fourth St., Minneapolis 55415 339-5976

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the district court is reported in 279 F.Supp. 675 (D. Minn. 1968) (A. 19-29). The opinion of the court of appeals is reported in 406 F.2d 837 (8th Cir. 1969) (A. 31-41).

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1969 (A. 42). The petition for a writ of certiorari was filed on April 10, 1969, and granted on June 23, 1969 (37 U.S.L.W. 3493) (A. 43). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 24 (Seventh) of the National Bank Act, 13 Stat. 101 (1864), 12 U.S.C. §24 (1964):

"§24. Corporate powers of associations.

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

. . . .

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; . . ."

Section 4 of the Bank Service Corporation Act, 76 Stat. 1132 (1962), 12 U.S.C. §1864 (1964):

"No bank service corporation may engage in any activity other than the performance of bank services for banks."

Section 10 of the Administrative Procedure Act, 80 Stat. 392 (1966), 5 U.S.C. 702 (Supp. II, 1965-66):

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Paragraph 3500, Comptroller's Manual for National Banks (Oct. 15, 1966 Ed.):

"Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers."

QUESTION PRESENTED

Whether independent data processing service organizations, whose business is to provide data processing services for the general business public, have standing to assert a claim (a) that national banks are illegally offering competing data processing services to the general business public and (b) that the Comptroller of the Currency has illegally authorized national banks to perform such services.

STATEMENT OF THE CASE

As petitioners' complaint was dismissed by the district court on motion before trial and before any information was obtained by any party in pre-trial discovery proceedings, this statement of the case is necessarily limited to the pleadings on file (A. 4-14).

Petitioners are the Association of Data Processing Service Organizations, Inc. (referred to as "ADAPSO"), and Data Systems, Inc., a Minnesota corporation and a member of that Association (referred to as "Data Systems"). The members of ADAPSO are engaged in the business of performing data processing services for the general business community. For some time prior to the commencement of this action, the respondent American National Bank and Trust Company of St. Paul, Minnesota, a national bank (referred to as "American Bank") had been similarly engaged in the business of performing data processing services for the general business community. In fact, respondent American Bank, at the time petitioners began their action, was performing or preparing to perform such services for the Minnesota State Capitol Credit Union, with whom petitioner Data Systems had previously agreed to perform such services, and for Carlen Industries, Inc., with whom Data Systems had previously been negotiating regarding such services (Petitioners' Complaint, pars. 13-16, A. 7-8). Petitioners brought this action to have American Bank's data processing activities of this nature

declared unlawful, to have them enjoined, and for damages resulting from these illegal activities.

Petitioners also sought declaratory and injunctive relief against the respondent Comptroller of the Currency (the "Comptroller"), as he had purported to authorize such activities in his 1966 ruling, which stated as follows:

> "Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers." *Comptroller's Manual for National Banks* (October 15, 1966 Ed.), par. 3500.

Petitioners have alleged, and for purposes of this review these allegations must be accepted, that these activities by the American Bank and the above ruling by the Comptroller are illegal under the National Bank Act, 12 U.S.C. §24 (1964), and that if these activities are continued under the umbrella of this ruling they will cause substantial and irreparable harm to petitioners.

Prior to trial, respondents moved to dismiss the complaint on the grounds that petitioners lacked standing to maintain this action (A. 15-17). The district court granted the motion (A. 18-19), and the court of appeals affirmed the judgment of dismissal (A. 42).

SUMMARY OF ARGUMENT

I.

In recent years, national banks have entered into several different fields of business not formerly considered as being within the business of banking. In all instances, the Comptroller of the Currency authorized these bank activities. Non-bank competitors have brought suit to enjoin both these bank activities and the Comptroller's actions in authorizing them. The basis for these lawsuits has been the assertion that the banks have engaged in activities not authorized and thus

prohibited by the federal banking laws. Various lower courts have split sharply on the question of the claimants' standing to bring these actions. These conflicts among the courts indicate that a fundamental re-examination of the rules of standing is required. This re-examination compels the conclusion that there should be standing for these claimants to assert their claims of illegal action.

In *Flast v. Cohen,* 392 U.S. 83 (1968), this Court stated that the concept of standing is related to the restrictions of Article III of the Constitution limiting the federal judicial power to cases and controversies. In constitutional terms, the question of standing is whether a claimant has alleged such a personal stake in the outcome of the controversy as to assure concrete adverseness of a dispute which is capable of judicial resolution.

When the present case is considered in terms of the constitutional requirements of standing, there is no doubt that a competitor has standing within the limits of Article III to assert his claim of illegal competition. His personal stake in the litigation is direct and important. Consistent with this analysis, this Court has found no constitutional bar to actions based on a competitive interest. *FCC v. Sanders Bros. Radio Station,* 309 U.S. 470 (1940); *Chicago v. Atchison, T. & S.F. Ry.,* 357 U.S. 77 (1958).

Granting the constitutional power to entertain such claims, an examination of the policy considerations behind the rules of standing indicates that there are no valid reasons to deny standing to competitors.

To the extent that the rules of standing are designed to exclude persons who have no personal interest in the litigation, the rules do not apply to the present case. To the extent that these rules are designed to bar hypothetical, friendly or collusive lawsuits, or disputes not capable of judicial resolution, these rules do not apply to the present case.

The underlying substantive issues involved in the merits of the present case are vitally important both to the parties and to the public. To the extent that the rules of standing have flexibility in any particular case depending on the importance of the substantive issues involved, the present case is a compelling one in favor of standing, involving as it does the legality of actions taken by the banking industry, where public interests are of paramount importance.

Competitors are the most natural, and probably the only, persons to bring to the courts these important questions of the legality of bank actions.

II.

The doctrine of *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118 (1939), denying standing to competitors because they lack "legal rights," is unsound because the result in that case was not based on a proper application of the underlying considerations which should frame and limit the rules of standing. The rationale of this decision has been subject to varying interpretations, but under any interpretation it would be merely coincidental if an application of the rule of that case carried forward the principles behind the rules of standing. The rule of that case should therefore not be extended to the present case.

Instead, whenever there is presented to the courts a constitutional case or controversy, where the claimant has been injured in fact, and where important public issues are involved, that case should be heard unless Congress has barred judicial review. Other cases have accepted this reasoning, including cases from this Court. *Chicago v. Atchison, T. & S.F. Ry.*, 357 U.S. 77 (1958).

III.

Petitioners have standing under the settled rule that if Congress has indicated a legislative purpose to protect a competitive interest, that interest supplies standing to complain of its infringement.

In the Bank Service Corporation Act, 12 U.S.C. §1864 (1964), Congress clearly indicated a legislative purpose to protect data processors against bank competition. Specific amendments to the proposed Act, while it was pending in Congress, were made to protect this interest. A substantial body of legislative history reveals that certain key legislators were of the opinion that the Act limited banks as well as service corporations from entering the data processing business.

Even if the Act affects only service corporations, it is sufficient to give standing to petitioners under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §702 (1966), as being a relevant statute closely related to the statute allegedly violated.

ARGUMENT

I.

AN ANALYSIS OF THE CONSIDERATIONS UNDERLYING THE RULES OF STANDING COMPELS THE CONCLUSION THAT COMPETITORS SHOULD HAVE STANDING TO ASSERT CLAIMS OF UNLAWFUL COMPETITION AGAINST NATIONAL BANKS AND CLAIMS OF UNLAWFUL AUTHORIZATION OF SUCH COMPETITION AGAINST THE COMPTROLLER OF THE CURRENCY.

This Court has characterized the law of standing as a "complicated specialty of federal jurisdiction." *United States ex rel. Chapman v. FPC,* 345 U.S. 153, 156 (1953). Nowhere are these complications more sharply highlighted than in the recent cases involving challenges to the entrance of national banks into fields of business activity not traditionally encompassed within the business of banking. These cases reflect bank entrance into the data processing business (this case and *Wingate Corp. v. Industrial Nat. Bank,* 408 F.2d 1147, 1st Cir. 1969), the travel agency business. (*Arnold Tours, Inc. v. Camp,* 408 F.2d 1147, 1st Cir. 1969),

the business of dealing in revenue bonds (*Baker, Watts & Co. v. Saxon,* 261 F.Supp. 247, D.D.C. 1966, *aff'd sub. nom. Port of New York Authority v. Baker, Watts & Co.,* 392 F.2d 497, D.C. Cir. 1968), the investment fund business (*Investment Co. Institute v. Camp,* No. 21,662, D.C. Cir. July 1, 1969, CCH Fed. Banking L. Rep. ¶95,157), and the insurance business (*Saxon v. Georgia Ass'n of Ind. Ins. Agents, Inc.,* 399 F.2d 1010, 5th Cir. 1968). In each case, the Comptroller authorized the national bank activity in question. In each case, a competitor brought suit to have the competitive activities enjoined. In four of the cases (the *Wingate* case, the *Baker, Watts* case, the *Investment Co. Institute* case, and the *Georgia Ins. Agents* case) the courts held the competitor had standing. In two cases (this case and the *Arnold Tours* case) the courts held the competitors lacked standing. In two of the cases where standing was found (the *Investment Co. Institute* and the *Georgia Ins. Agents* cases), the three judges hearing the particular case could not agree on the reasons for upholding standing and one judge on each court felt compelled to issue a concurring opinion on this question.

Surely the divergent results reflected in these cases in essentially similar situations indicate that the present rules of standing in this area are not working satisfactorily and compel a fundamental reconsideration of these rules. We believe that this reconsideration leads most reasonably to the conclusion that competitors of the national banks are entitled to challenge allegedly unlawful national bank activities and allegedly unlawful rulings by the Comptroller authorizing these activities.

The most searching recent analysis of the policies behind the law of standing is to be found in *Flast v. Cohen,* 392 U.S. 83 (1968). In that case Chief Justice Warren began with the premise that Article III of the Constitution restricts the

judicial power of the federal courts to "cases" and "controversies." One aspect of this limitation on the federal judicial power has been framed in terms of standing:

> "Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Flast v. Cohen,* 392 U.S. at 101.

How is a court to determine whether a dispute before it satisfies the constitutional requirements relating to standing? This determination must be made by an inquiry into the relationship between the claimant and his claim. (*Flast v. Cohen,* 392 U.S. 99):

> "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' Baker v. Carr, 369 U.S. 186, 204 (1962)."

This concept of standing had been phrased in similar terms some years before:

> "More precisely stated, the question of standing in this sense is the question whether the litigant has a sufficient personal interest in getting the relief he seeks, or is a sufficiently appropriate representative of other interested persons, to warrant giving him the relief, if he establishes the illegality alleged—and, by the same token, to warrant recognizing him as entitled to invoke the court's decision on the issue of illegality." Hart and Wechsler, *The Federal Courts and the Federal System* 174 (1953).

When standing is viewed in terms of "personal stake" or "personal interest" in the outcome of litigation there is no question that, logically, a competitor will have standing to challenge both allegedly illegal competition and the adminis-

trative action authorizing such competition. The personal stake or interest of a competitor is second to none in such situations. Consistent with these principles, this Court has repeatedly allowed a competitor standing to challenge allegedly unlawful competition, thus establishing beyond any doubt that Article III is no bar to suits of this nature.

FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940);
Scripps-Howard Radio v. FCC, 316 U.S. 4 (1942);
The Chicago Junction Case, 264 U.S. 258 (1924);
Frost v. Corporation Comm'n, 278 U.S. 515 (1929);
Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77 (1958).

With the constitutional power allowing competitors access to the federal courts being firmly established, it becomes appropriate to examine the considerations which *as a matter of policy* should be weighed in determining whether to deny particular claimants access to the courts to hear their claims. When these considerations are weighed in the present case, the scale tips heavily in favor of permitting these claims to be heard.

1. Perhaps the most fundamental reason for hearing such cases flows from the nature of the petitioners' claim: they will, in fact, suffer substantial harm from allegedly illegal bank activities which have been authorized by allegedly illegal governmental action. As a first principle, the courts should be open to redress harm resulting from unlawful action:

> "The reasons in favor of permitting a challenge of governmental action by one who is in fact adversely affected by that action are very powerful. The strongest reason is the principle of elementary justice that one who is in fact hurt by illegal action should have a remedy." 3 Davis, *Administrative Law Treatise* 211 (1958) [hereinafter cited as *Davis*].

Applying this principle to the general area of allegedly illegal competition by national banks, there can be little doubt that non-bank businesses are subject to material harm from bank invasion of their areas of business endeavor. For example, in the investment fund field, the Comptroller has predicted that within ten years commercial banks "might capture as much as two billion dollars of mutual fund business." *Hearings on H.R. 8499, 9410 before the Commerce and Finance Subcommittee of the House Committee on Interstate and Foreign Commerce,* 88 Cong., 2d Sess. 26 (1964).

In the particular case before this Court, there can be no doubt of harm to the individual petitioner, Data Systems. The complaint in this action alleges that Data Systems had reached an agreement with a particular customer to provide data processing services and that thereafter the respondent bank supplanted Data Systems as the supplier of the data processing services (Paras. 13-14, Complaint, A. 7). Of course, petitioners' complaint was dismissed on motion before there was any opportunity to develop a concrete record on the extent of the harm, but the complaint alone is clearly sufficient to support at this point a preliminary finding of injury in fact. (The complaint having been dismissed before trial, its allegations of fact must be accepted for purposes of this review.)

Thus, to the extent that the restrictive rules of standing are designed to bar claimants who have no personal interest in the outcome of the litigation, the rules surely have no application to the present case.

2. Access to the courts presumably will be denied where the courts lack confidence that "the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor" required to

assure that the controversy will be "capable of judicial resolution." *Flast v. Cohen,* 392 U.S. at 106.

The present case presents in particularly sharp focus the "concrete adverseness" required under these principles. If the merits of the present case are ever reached, the specific clash between Data Systems and the American National Bank over specific customers insures the development of a full record regarding the issues involved in this case. The setting of this litigation establishes beyond doubt that this case is *not* one where the claimant "seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." *Flast v. Cohen,* 392 U.S. at 106.

The twofold task of the federal courts in this type of case is familiar and traditional: to determine whether certain conduct is prohibited by statute, and to determine whether administrative action has exceeded statutory authority. The basic relief requested by petitioners—injunction of illegal action—presents no unusual problems for a federal court. It is obvious that the controversy is "capable of judicial resolution."

3. A further reason not to deny access to the courts in this case stems from the importance of the underlying substantive issues involved, both to petitioners and to the public. Considerations of this nature have recently been explicitly noted by the courts. *Investment Company Institute v. Camp,* No. 21,662, D.C. Cir., July 1, 1969. A thoughtful commentator has also suggested this approach.[1]

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[1] "Our analysis of *Sanders* and of public actions generally suggests that the line between legal grievance and a factual grievance is often difficult to draw, just as it may be difficult to determine whether an issue is 'big' enough to concern 'the public.' Where the classification of the grievance is inconclusive, judicial discretion in terms of the size, urgency, and clarity of the issue at stake may be a useful tool in the decision to take jurisdiction. Dryly techni-

From the standpoint of both petitioners' "private" interest and the "public" interest in the banking system the present case is particularly appropriate for judicial review. Unquestionably, the data processing service industry is a significant and growing segment of American industry. A survey undertaken by petitioner ADAPSO in 1966 estimated that in 1970 the revenue for the data processing service industry would exceed one and one quarter billion dollars. *An Economic Analysis of the Data Processing Service Industry*, p. 11 (published in March, 1967, by the Association of Data Processing Service Organizations, Inc.).

The survey further indicated that competition from banks is a significant factor in the data processing service industry. *Economic Analysis, supra*, pp. 9-10.

A recent survey conducted by the American Bankers Association indicates that some 2,000 banks, including almost all of the larger banks, provide or intend shortly to provide data processing services to other banks and bank customers. See *Motion for Leave to File Brief on Behalf of the American Bankers Association as Amicus Curiae in Support of Petitions for Writs of Certiorari*, June 12, 1969, filed in these proceedings, p. 7. Certainly these surveys reveal a significant area of competition.

The Comptroller himself acknowledges the importance of the problems involved, when he notes that in 1967, 82 per cent of banks with fifty million to one hundred million dollars in assets offered computer services to customers; the

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cal issues, issues of peripheral relevance to the administrative task, issues not presently well-focused, issues better handled elsewhere need not be decided by a court or forced upon an agency, certainly not at the suit of persons whose claim to justice or to the attention of this forum is marginal. On the other hand, in a case where the sense of personal grievance although acute is not clearly grounded in law, a court may appropriately intervene to correct clear illegality even though 'the public' is not overly concerned." Jaffe, *Judicial Control of Administrative Action* 527-28 (1965). [Hereinafter cited as *Jaffe*.]

figure rose to 98 per cent of banks with over five hundred million in assets. *Petition by Comptroller of the Currency for Writ of Certiorari in Camp v. Wingate Corp.*, No. 1511, Oct. Term 1968, p. 9. In effect, the Comptroller argued in his petition in *Wingate* that because of the importance to the banking industry of the questions raised in these cases, this Court should reverse a lower court decision that allowed the merits of the questions to be reached.

Thus, from the viewpoint of all parties, the subject matter of the litigation clearly involves questions of major importance. This case, however, assumes even greater significance when consideration is given to the vital *public* interest in insuring that the nation's banking laws are not violated. The sensitive nature of the banking industry has been repeatedly recognized by the courts,[2] by Congress,[3] by admin-

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[2] "No doubt Congress has continuously, from 1864 to the present, been 'very careful' (see *infra*) in restricting the activities of banks . . . ." [T]he thrust of the close regulation of banks is for purposes of stability . . . ." *Wingate Corporation v. Camp*, 408 F.2d at 1151.

"A grocery store or data processing company failure or bankruptcy would be unfortunate and cause the proprietors and owners to lose their investment, but a bank failure would cause not only loss of the owner's investment but also loss to many unwary members of the public who are depositors." *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 279 F.Supp. 675, 680 (D. Minn. 1968).

[3] "Generally, banks have been prohibited from carrying on any business other than that of banking. This prohibition, which has been an accepted tradition throughout the banking industry, is grounded upon the conviction that banking is a quasi-public industry. Therefore, the chartering of banks has been subject to Government approval, and the continuing solvency of banks has been zealously guarded by the chartering authority. One of the principal means of guarding that solvency has been by limiting the activities, investment or otherwise, in which banks can engage." *S. Rep. No. 2105*, 87th Cong., 2d Sess. 10 (1962) (supplemental views of Senators Proxmire, Douglas, and Neuberger).

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Undeniably, entry by national bank
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d include serious finan-
data processing equip-
nnection with the per-

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[4] "Chairman Martin noted that the principal company field arise from two circumstances:

. . . .

(2) The combination under single control ing enterprises, permitting departure from th tions should not engage in business wholly un bination involves the lending of depositors' business enterprise, not connected with bank of trusteeship." *S. Rep. No. 1095*, 84th Cong

roblems in the bank holding

f both banking and nonbank- principle that banking institu- lated to banking. Such a com- oney, whereas other types of g, do not involve this element 1st Sess. 2 (1955).

[5] "Bank regulation in this country dates back n ter. It came into being as soon as there was failure could be more destructive to individu failure of any other type of enterprise. This ties for the most part are held by businesses circulating medium. Accordingly, the closi hardship upon the individual by destroying able—a portion of his monetary resources, portant, a bank failure frequently paralyzed munity. On occasion, when failures were m the nation, was prostrated." Archie K. Dav Association, 1966, *Banking Regulation Toda* Contemp. Prob. 639 (1966).

re than a century and a quar- eneral realization that a bank and to a community than the s simply because bank liabili- and individuals and constitute of a bank not only worked r making temporarily unavail- t, also, and perhaps more im- he economic life of the com- erous, an entire state, or even , President, American Bankers *A Banker's View*, 31 Law &

[6] In 1967, company officials of Villager, Inc., l a new computer for a 40% drop in profits in t ter, in which profits dropped from $1,790,9 $1,001,103. *Wall Street Journal*, September

ned the high cost of installing company's second fiscal quar- 4 in a comparable quarter to 1, 1967, p. 28.

formance of data processing services.[7]

In view of these hazards, it is of major public interest to determine whether national banks are lawfully permitted to engage in the business giving rise to the risks. But who will protect this public interest?

In the first instance, the Comptroller of the Currency has been granted by Congress the authority to supervise the banking system. 38 Stat. 261 (1913), 12 U.S.C. §1 (1964). However, it has been repeatedly held that the Comptroller's decisions are subject to judicial review.

First Nat'l Bank v. Saxon, 352 F.2d 267 (4th Cir. 1965); *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381 (8th Cir. 1966).[8]

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[7]In *Clements Auto Co. v. Service Bureau Corp.*, 298 F.Supp. 115 (D. Minn. 1969), the court held a data processing company liable for damages of $480,811.33 for misrepresenting the necessity for, and benefits to be expected from, the installation of a data processing system for inventory control.

The *Wall Street Journal*, March 27, 1968, p. 1, reported a judgment against International Business Machines for $53,200 for computer programming errors causing failure of a computer to properly perform billing and inventory control services for a business concern.

[8]In *Webster Groves*, the court stated as follows:

"The Comptroller takes the position that neither the appellant nor any of the competitor banks have a standing to challenge the chartering of a new national bank; that the chartering of a new national bank is discretionary and is not subject to judicial review . . . .

"We believe that competing banks, as interested parties, have a right to challenge illegal acts of the Comptroller and that the Comptroller's discretionary actions are not immunized from judicial review . . . . (p. 384.)

"The Comptroller, however, must be subordinate to the law from which he received his authority, and is subject to the limitations imposed by that law. Therefore, if he acts in excess of his statutory grant of power, acts arbitrarily or capriciously, abuses his discretion, or unlawfully discriminates in violation of the Constitution, he is certainly subject to restraint by the courts . . . . (p. 387.)

"The Comptroller is also asserting that a competitor has no standing to object to lawful competition. With this rule we find no fault, but the banks surely have the standing to object to illegal competition. Frost v. Corporation Commission of Oklahoma, 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483 (1929); National Bank of Detroit v. Wayne Oakland Bank, 252 F.2d 537 (6 Cir. 1958), cert. denied 358 U.S. 830, 79 S.Ct. 503. Therefore, when a competi-

The question posed previously should thus be restated to ask: Who will challenge illegal actions of the Comptroller? An examination of the potential challengers confirms the conclusion that a competitor will be the most likely and most vigorous challenger.

Under *Flast v. Cohen* is is doubtful that a taxpayer could challenge Comptroller action. There is involved here "an essentially regulatory statute" which may not be challenged by taxpayers as such.

It is unlikely that a bank depositor or customer would attack the actions involved in this case. "The intended beneficiaries of the banking laws, if the class is narrower than the public, are bank customers who have no immediate and compelling interest in litigation to further long-term sound banking." *Investment Co. Institute v. Camp,* CCH Fed. Banking L. Rep. 80,166 (Bazelon, J., concurring).

Conceivably, a bank shareholder could challenge the questioned actions. But such a challenge has not yet appeared and would be of questionable validity. A shareholder, unlike a competitor, would have extreme difficulty in showing any actual injury. See *Ashwander v. TVA,* 297 U.S. 288 (1936). Certainly, when the injury to a competitor is compared to the injury to a bank shareholder, the competitor's interest is more direct and substantial. It is reasonable to believe that such a lawsuit would be more likely "pursued with the necessary vigor" by a competitor than a shareholder. In any event the possibility that a shareholder might challenge the action here questioned should not bar the present lawsuit.[9]

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tor believes he is being subjected to illegal competition owing to impropriety by the Comptroller, the courts should be open to hear and decide the alleged wrong." (p. 388.)

[9] "However, if, as we conclude, there are circumstances under which a taxpayer will be a proper and appropriate party to seek judicial review of federal statutes, the taxpayer's access to federal courts should not be barred because there might be at large in society a hypothetical plaintiff who might possibly bring such a suit." *Flast v. Cohen,* 392 U.S. at 98, n. 17.

Professor Louis Jaffe has analyzed the law of standing in terms of "public actions" and "private actions." *Jaffe* 459-545. In a "public" action, the party seeking judicial review of administrative action would not be required to show a personal interest in the litigation; standing would be grounded in the public interest in judicial review of certain aspects of governmental action. In the "private" action, the standing of the claimant is grounded in a "distinctive or discriminating impact which specially entitles him to challenge an allegedly illegal administrative action." *Jaffe* 501. See also Harlan, J., dissenting in *Flast v. Cohen*, 392 U.S. at 116. Regardless of the sharpness of the distinction between the two types of actions, it is apparent that they merge in a unique manner in the present case. The inescapable fact that the competitor here has suffered actual harm gives him the "personal stake" that this Court required in *Flast v. Cohen*, and, indeed, a stake that goes far beyond the interest of the plaintiffs in that suit; this financial interest makes the competitor the logical and probably the only person willing and able to assert the acknowledged vital public interest in the proper functioning of the national banking system.[10]

The decided cases in this field have borne out the preceding contentions. In all these cases it has been a competitor

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[10]This Court has not been unaware of strong motivation supplied by injury to financial interests in redressing public rights. In commenting on the standing of a book publisher to bring action against a State Commission which attempted to dissuade third parties from distributing the publisher's books, the Court stated as follows:

"Finally, pragmatic considerations argue strongly for the standing of publishers in cases such as the present one. The distributor who is prevented from selling a few titles is not likely to sustain sufficient economic injury to induce him to seek judicial vindication of his rights. The publisher has the greater economic stake, because suppression of a particular book prevents him from recouping his investment in publishing it. Unless he is permitted to sue, infringements of freedom of the press may too often go unremedied." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 65, n. 6 (1963).

who has shouldered the considerable burden of litigation. The results in those cases where the barrier of standing was surmounted have been of substantial public benefit. In two of the three cases where the courts of appeals have reached the merits it was decided that the banks were prohibited from engaging in the particular activity in question. *Saxon v. Georgia Ass'n of Ind. Ins. Agents, Inc.*, 399 F.2d 1010 (5th Cir. 1968); *Port of New York Authority v. Baker, Watts & Co.*, 392 F.2d 497 (D.C. Cir. 1968). Had the banks and the Comptroller been successful in their efforts to resist inquiry into the merits of these actions, both would presumably still be acting in violation of law.

To summarize, it is beyond dispute that the federal courts have the power, consistent with Article III of the Constitution, to hear petitioners' claims. Both from the standpoint of petitioners, who have suffered material injury, and from the standpoint of the strong public interest in the functioning of the banking system, it is important that the merits of the controversy be determined. Why, then, have the courts been so troubled with problems of standing in this area? What are the reasons for the contradictory results among the various courts which have considered the problem? We submit that these problems have primarily arisen as a result of the lower courts' efforts to apply or distinguish the ruling by this Court in *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118 (1939), that competitors lacked standing to challenge the constitutionality of the legislation establishing the Tennessee Valley Authority. We further submit that, just as this Court in *Flast v. Cohen* recently re-examined the restrictive rules of standing of *taxpayers*, so the Court should similarly undertake a fresh evaluation of these restrictive rules as they relate to *competitors* of national banks.

II.

THE RESTRICTIVE RULES ESTABLISHED IN THE TENNESSEE ELECTRIC POWER CASE CONFLICT WITH THE UNDERLYING POLICY CONSIDERATIONS WHICH SHOULD FRAME AND LIMIT PROPER RULES OF STANDING AND CONSEQUENTLY THESE RESTRICTIVE RULES SHOULD NOT BE EXTENDED TO NEW FIELDS.

In *Tennessee Electric Power*, a number of private power companies brought action to challenge the constitutionality of legislation establishing the TVA. The Court held that these competitors lacked standing in a decision which appears to have been based on two principles of doubtful soundness: (1) a claimant may not challenge governmental action "unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege" (306 U.S. 137-38), and (2) "the damage consequent upon competition, otherwise lawful, is in such circumstances *damnum absque injuria*, and will not support a cause of action or a right to sue." (306 U.S. 140.)

(1) As to the stated requirement of "legal right": This reasoning has been consistently criticized:

> "Such an approach is demonstrably circular: if the plaintiff is given standing to assert his claims, his interest is legally protected; if he is denied standing, his interest is not legally protected." Wright, *Federal Courts* 38 (1963).
>
> "When a legal right of the plaintiff is not at stake, a plaintiff sometimes has standing and sometimes lacks standing. Circular reasoning is very common, for one of the questions asked in order to determine whether a plaintiff has standing is whether the plaintiff has a legal right, but the question whether the plaintiff has a legal right is the final conclusion, for if the plaintiff has standing his interest is a legally-protected interest, and that is what is meant by a legal right." 3 *Davis* 217.

The requirement that a "legal right" be invaded as a condition precedent to a finding that a claimant has standing is valueless as an aid to determining the outcome of close cases. For in close cases the answer to the preliminary question whether a "legal right" has been invaded depends solely on the answer to the ultimate question whether the claimant has standing. Therefore, to determine that a claimant's legal rights have not been invaded is merely to announce the conclusion that the claimant is without standing.

Aside from logical difficulties, the "legal right" theory runs into practical problems. As pointed out by Professor Jaffe, much administrative action does not readily lend itself to classification in "traditional right-duty" terms and therefore the "legal right" requirement to support a challenge to administrative action is not appropriate. *Jaffe* 508.

(2) As to the Court's discussion of "damnum absque injuria": The other reason given in *Tennessee Electric Power* for denying standing is, like the "legal right" requirement, merely a conclusion. Admittedly there are strong policy considerations favoring lawful competition in this country. For this reason, the economic harm to a competitor resulting from competition of this nature is not protected by the law. In effect, there is a privilege to inflict financial harm upon another in the pursuit of one's own legitimate economic interests, and *no one* may object to such conduct. See Carpenter, *Interference With Contract Relations*, 41 Harv. L. Rev. 728, 754-62 (1928).

Granting these premises, it does not at all necessarily follow that the considerations favoring and protecting lawful competitive activities are equally applicable to competitive activities which are prohibited by legislation or Constitution, or that these considerations are not outweighed by other considerations militating in favor of allowing an injured party to object to this type of conduct. Perhaps the Court

in *Tennessee Electric Power* weighed the conflicting considerations; the opinion does not articulate this process if it occurred. To support its conclusion, the Court cited *Railroad Co. v. Ellerman*, 105 U.S. 166 (1882), a case resting upon the "legal right" theory previously discussed.[11]

Perhaps because of the absence of an analysis of the underlying considerations for its conclusion, *Tennessee Electric Power* has been subject to varying interpretations by courts and commentators alike. The case has been thought of as having been grounded in "considerations of separation of powers," [12] as involving "federally financed competition by a new competitor who was *lawfully* authorized to compete," [13] or as based on the "philosophy of *Frothingham v. Mellon* . . . that not just anyone should have standing to assert the invalidity of a federal program." [14] Another surmise was that the Court decided "on the merits but without opinion, that the Constitution does not protect against competition by such a governmental unit as the TVA [footnote omitted] or that the case was for some discretionary reason an unsuitable one in which to pass on the constitutionality of the Tennessee Valley Authority." [15]

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[11] "The legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty . . . . The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right." *Railroad Co. v. Ellerman*, 105 U.S. 166, 173-74 (1882).

[12] Bazelon, J., concurring in *Investment Co. Institute v. Camp*, CCH Fed. Banking L. Rep. 80,164.

[13] Elliott, J., in *Georgia Ass'n of Ind. Ins. Agents v. Saxon*, 390 F.2d 1010, 1016 (1968).

[14] Thornberry, J., concurring in *Georgia Ass'n of Ind. Ins. Agents v. Saxon*, 390 F.2d at 1020.

[15] Bickel, *The Supreme Court, 1960 Term, Forward: The Passive Virtues*, 75 Harv. L. Rev. 40, 44 (1961).

Tennessee Electric Power has recently been explained by this Court as denying standing "because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury." *Hardin v. Kentucky Util. Co.*, 390 U.S. 1, 6 (1968). This principle is the converse of the holding of the Court in *Hardin* "that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision." (390 U.S. at 6.)

We agree with the holding in *Hardin* which *granted* standing, but we believe this Court should re-examine the doctrine *denying* standing solely because of the absence of a legislative purpose to protect the competitive interest. The restrictive rule does not necessarily follow from the permissive rule: merely because a court *must grant* standing where the legislature has protected an interest, it is not required that a court *deny* standing where that particular legislative purpose does not appear. The difficulty with a rule making standing dependent on legislative protection is at least threefold:

1. The presence or absence of a legislative purpose to protect a competitive interest has no more than a fortuitous relationship to the actual harm or injury which the claimant may have suffered, or to his "personal stake" in the controversy[16].

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[16] "The interest of a competitor in avoiding increased competition or reducing existing competition should be enough to give him standing to challenge the constitutionality of a statute which directly affects his competitive position, even though the statutory provisions are not in terms aimed at him and do not order him to do, or refrain from doing, anything.

"The competitor's standing should be clear if we look to the very basis of the standing requirement itself. That requirement stems from the recognition that, within the framework of our adversary system, the adjudicatory process is most securely founded when it is exercised under the impact of a real conflict between antagonistic demands. Hence, it follows that the case

2. The presence or absence of a legislative purpose to protect a competitive interest has no more than a fortuitous relationship to the *public* interest involved in requiring compliance with the substance of the legislation.[17]

3. The rule is often difficult to apply. In many instances judges in the lower courts have been unable to agree whether Congress did or did not indicate a design to protect a competitive interest. For example in the *Georgia Ins. Agents* case, 399 F.2d 1010 (5th Cir. 1968), where the majority found such a congressional purpose in Section 92 of the National Bank Act, 39 Stat. 753 (1916), Thornberry, J., concurring, stated "But in evaluating the legislative history of Section 92, I find little evidence of an intent to protect insurance agents from competition." 399 F.2d at 1019.

Whatever the rationale of *Tennessee Electric Power* may be, we believe that case should not be extended to this one. Certainly, where Congress has protected a competitive interest, that interest becomes a "legal right" and *must* be heard under any rule of standing. But even though such legislative protection may be lacking, where there exists (1) a case

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must be one which is, in actual fact, the litigant's own, so that it will be pressed by him to the extent needed to sharpen and illuminate the constitutional issues. If we look to the financial interest of a businessman, whose competitive position is directly affected by a statute aiding his competitor, it is surely unreal to find that such businessman does not have the personal interest required to permit him to seek to have such statute ruled invalid. When he himself is financially harmed by the statute concerned, it is hardly to be feared that he will do less than his utmost in pressing his challenge to the law." 1 Schwartz, *A Commentary on the Constitution of the United States, Part I, The Powers of Government*, 440-41 (1963) (footnotes omitted).

[17]This anomaly was noticed by Judge Bazelon in the *Investment Co. Institute* case (CCH Fed. Banking L. Rep. 80,166-67):

"Thus, under the usual rules of standing, a state bank can enjoin illegal branching by national banks, but there is no party who can sue to enforce the separation between commercial banking and the securities business. Given the relative triviality of the threat to the banking system posed by outlaw branch banks as compared to the menace of illegal securities dealing, this result is too bizarre to have been intended by Congress."

or controversy within the meaning of Article III of the Constitution, (2) substantial injury, in fact, to the claimant, and (3) an important public interest, then the federal courts should be open to challenges of illegal government action. Such cases should be heard unless Congress has declared the administrative action in question to be unreviewable.[18] We believe that rules of standing based on these factors would more nearly accord with the underlying principles giving rise to these rules.

This approach was explicitly adopted in the recent decision in *Investment Co. Institute v. Camp*, No. 21,662, D.C. Cir., July 1, 1969, CCH Fed. Banking L. Rep. ¶95,157, where the court held that an association representing the mutual fund industry had standing to present the claim of illegal competition:

> "Evaluating Appellees' qualifications as prospective litigants on behalf of their own private economic interests and the public's interests, it becomes evident that they are indeed adverse both as respects their actual prosecution of this litigation and in regard to their fundamental challenge to the Comptroller's authority to allow the national banks to engage in this type of securities activity. Their financial interest in these proceedings has been examined in the preceding opinion, and when this is coupled with authoritative prognostications of impending financial harm to their interests if the Comptroller's regulations are allowed to stand [footnote omitted], it is obvious that there exists one cogent qualification of a challenger in the reasonable probability of factual aggrievement sufficient to insure the spirited adverseness necessary to judicial resolutions.
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> "With this element satisfied, on this record the alternative to a grant of Appellees' claim to standing would be to effectively frustrate any challenge to the regulations in question.

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[18]For an example of statutory exclusion see *AFL v. NLRB*, 308 U.S. 401 (1940).

"Because of the factors discussed heretofore I am unable to set aside my grave doubts as to Appellees' standing to institute and maintain these suits. However, in the uncertain state of the law as to standing, there is something to be said on both sides of that question. I therefore resolve my doubts in favor of the Appellees and concur in the result of that portion of the foregoing opinion which holds that the Appellees have standing. I am influenced substantially, as I indicated at the outset, by the need for judicial examination of the important questions raised." *Investment Co. Institute v. Camp*, CCH Federal Banking L. Rep. 80,172-73 (Burger, J., concurring).

"Principles of standing in competitors' suits have operated as rules of thumb to sort out proper plaintiffs and legal issues of competition deemed appropriate for judicial resolution. Both are present here. It is not disputed that the members of the ICI are aggrieved by the Comptroller's ruling . . . . The ICI presents a question of statutory construction to define the boundaries of official authority, a type of question well within the traditional competence of courts of law. It is the only party likely to assert the public interest in observance of the banking laws by the agency responsible for enforcing them. In the exceptional circumstances of this case, I would grant the ICI standing to vindicate the public interest despite the absence of statutory aid to standing." *Investment Co. Institute v. Camp*, CCH Fed. Banking L. Rep. 80,167 (Bazelon, J., concurring).

This approach to questions of standing is not unknown in other jurisdictions. In *Elizabeth Fed. Sav. & Loan Ass'n v. Howell*, 24 N.J. 488, 132 A.2d 779 (1957), the court upheld standing of a savings and loan association to challenge the establishment of a branch office by a competing association. Chief Justice Vanderbilt framed the considerations relevant to standing in the following terms:

"We condition the right to invoke the judicial power, however, by the requirement that there be some interest to be protected beyond a mere abstraction; but yet, in cases involving substantial public interest, the courts

have held that 'but slight private interest, added to and harmonizing with the public interest' is sufficient to give standing. . . . Moreover, this right to seek judicial review of administrative decisions . . . belongs to all persons who are directly affected by and aggrieved as a result of the particular action sought to be brought before the courts for review.

. . . .

"Competing banking institutions may be the only persons with sufficient private interest in harmony with the public concern for the safety of savings and bank deposits to bring the attention of the courts to errors of law in an administrative action granting a license to establish a branch contrary to the standards set by the statute delegating authority to so act. If such banking institutions do not have the necessary standing, who then is there who can or will challenge an administrative decision favorable to the applicant? Without standing in the appellants to invoke the power of judicial review, the Commissioner's action . . ., right or wrong, proper or arbitrary, takes on a conclusive character to the possible great detriment of the people as a whole." (132 A.2d 779, 785-786, 787.)[19]

An English decision involving the writ of certiorari takes the same approach, without, however, even requiring an important public interest. *Rex v. Richmond Confirming Authority* [1921], 90 L.J.K.B. (n.s.) 413, involved standing of a liquor dispenser to challenge the grant of a license to a competitor. In upholding standing, the court stated as follows (Earl of Reading, C.J.):

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[19]A similar decision is *People ex rel. Ayres v. Board of State Auditors*, 42 Mich. 422, 4 N.W. 274 (1880), where, in granting mandamus at the request of a printer to compel state officials to let a printing contract according to statute, the court stated:

"The rule which rejects the intervention of private complainants against public grievances is one of discretion and not of law. There are serious objections against allowing mere interlopers to meddle with the affairs of the state, and it is not usually allowed, unless under circumstances where the public injury, by its refusal, will be serious." (4 N.W. at 279.)

> "The first point turns entirely on the question whether the applicant can be said to be a person aggrieved . . . . The applicant does not, in my opinion, stand in the same category as a member of the public who may be said to have only a general interest in seeing that the law is properly carried out. He had a particular interest in this subject-matter . . . ." (90 L.J.K.B. (n.s.) at 415.)

This Court also has, in the past, gone beyond the rule of *Tennessee Electric Power*. In *Chicago v. Atchison, T. & S.F. Ry.*, 357 U.S. 77 (1958), the Court had before it a case testing the validity of an ordinance which purported to bar the Railroad Transfer Service Company from entering into the business of transporting passengers between railroad stations in Chicago. Parmalee, already engaged in that business, had been permitted to intervene in the lower court. This Court requested counsel to consider the following jurisdictional issue (357 U.S. at 82):

> "Whether Parmelee Transportation Co. has standing to seek review here on appeal or by writ of certiorari."

The Court gave the following reasons for its affirmative answer to this question (357 U.S. at 83-84):

> "Parmelee has standing to secure review of the judgment below by appeal. It is enough, for purposes of standing, that we have an actual controversy before us in which Parmalee has a direct and substantial personal interest in the outcome. Undoubtedly it is affected adversely by Transfer's operation. Parmelee contends that this operation is prohibited by a valid city ordinance and asserts the right to be free from unlawful competition. Transfer, on the other hand, suggests that Parmelee has no standing because the city ordinance is invalid and Transfer's operation is lawful. It argues that a party has no right to complain about lawful competition, citing *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, and *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118. We do not regard either of these cases as controlling here. It seems to us that Transfer's argument confuses the merits of the controversy with the

standing of Parmelee to litigate them. Cf. *Bell* v. *Hood*, 327 U.S. 678. Parmelee's standing could hardly depend on whether or not it is eventually held that Transfer can lawfully operate without a certificate of convenience and necessity."

The parallel between that case and the present case is close. In the earlier case, the party seeking standing alleged that an ordinance prohibited another's entry into the field; in the present case, petitioners allege that national banks are prohibited from entry into the data processing service business.[20] In the earlier case, the party entering the field claimed the ordinance was invalid; in this case, the respondents claim that the statute does not prohibit them from entering the field. The nature of the threatened harm is identical: financial injury as a result of competition allegedly prohibited by law. The claimants' "personal interest in the outcome" is also identical. The decision in the present case should be governed by the same considerations which led the Court to grant standing in the earlier case. Personal interest, or harm, in fact, not "legal right," should be the touchstone to standing, particularly where the personal interest merges with a vital public interest in the questions presented.[21]

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[20] As recognized by the First Circuit, "It has long been settled . . . that the enumeration of such powers [in 12 U.S.C. §24(7)] is an effective and strong prohibition of all activities not enumerated and not incidental to banking. See First National Bank of Charlotte v. National Exchange Bank (1875), 92 U.S. 122, 128, 23 L.Ed. 679; National Bank v. Matthews (1878), 98 U.S. 621, 625, 25 L.Ed. 188; Logan County National Bank v. Townsend (1891), 139 U.S. 67, 73, 11 S.Ct. 496, 35 L.Ed. 107." *Wingate Corp. v. Ind. Nat. Bank*, 408 F.2d 1147, 1150 (1969).

[21] "The courts, in holding, as they sometimes do, that someone like a competitor or a consumer has no standing, have lost sight of the overriding need in our system—to make sure that someone shall in fact be able to secure review of administrative action. It is only if this need is satisfied that the principle of administrative legality can truly be enforced. It is in the interest of the community as a whole that illegal agency action be not left untouched. It is for the judiciary to vindicate this interest by ensuring that there are no unnecessary obstacles in the path of those seeking to challenge

III.

PETITIONERS HAVE STANDING BECAUSE CONGRESS, IN ENACTING THE BANK SERVICE CORPORATION ACT, EVINCED A SPECIFIC LEGISLATIVE PURPOSE TO PROTECT THE COMPETITIVE INTEREST OF DATA PROCESSORS AGAINST NATIONAL BANK COMPETITION.

It is firmly settled that if a legislative purpose can be found to protect a competitive interest, the injured competitor has standing to complain of the disregard of the protected interest. *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968). The courts in the Eighth Circuit in this case and the First Circuit in the *Wingate* case agreed on the existence of this rule but differed sharply on its applicability to the identical factual pattern presented in the two cases. The First Circuit ruled that section 4 of the Bank Service Corporation Act, 76 Stat. 1132 (1962), 12 U.S.C. §1864 (1964), gave standing to data processors, while the Eighth Circuit held in a footnote that the Act was not applicable. An inquiry into the legislative history of the Act demonstrates the validity of the First Circuit's resolution of the question.

In 1962, Congress passed the Bank Service Corporation Act to enable national banks to join together in common ownership of subsidiary corporations established to perform data processing and clerical services for banks. At that time, it was felt that the banking laws prohibited banks from acquiring ownership of subsidiary service organizations. The purpose of the 1962 statute was stated in the following terms:

> "The purpose of H.R. 8874 is to help small and medium-sized banks compete more effectively with larger banks and give better service to the public, by forming bank service corporations which will make available

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the legality of administrative action. To construe the standing requirement as our courts sometimes do is to place an unnecessary obstruction on the road of justice." 9 Administrative Law Bulletin 122, Bernard Schwartz, Editor (1957).

efficient and expensive equipment the banks individually could not afford to buy." 108 *Cong. Rec.* 22029 (1962). (Statement by Senator Robertson, Chairman of Senate Banking and Currency Committee.)

The law originated in the House of Representatives, H.R. 8874, 87th Cong., 2d Sess. (1962). As introduced, Section 4 of the bill read as follows:

> "Sec. 4. No bank service corporation may engage in any revenue-producing activity other than the performance of bank services for banks and, to an extent not exceeding one-half of its total activity, the performance of similar services for persons or organizations other than banks." 108 *Cong. Rec.* 16503 (1962).

This provision created serious questions in the House regarding its effect on competitors such as petitioners:

> "Mr. Roosevelt. . . . May I just add, sir, a point which somewhat worries me. There are, in California, and I assume there may be in the gentleman's State and also in other States, many businesses which might be called data processing concerns which have arisen in recent years and which seek to perform many of the services this bill is directly aimed at.
>
> "What worries me is not that the banks could collaborate together to perform these services, but that they could also compete with outside private concerns doing the same type of processing. Would this not be unfair to a rising new industry? Such competition could come not only from a combination of smaller banks, but from the larger independents as well." 108 *Cong. Rec.* 16501 (1962).

Congressman Reuss replied to Congressman Roosevelt's expression of concern:

> "Mr. Reuss. Further on the point raised by the gentleman from California I would call his attention to the fact that a big bank which has its own data processing equipment is now able, without limitation, to go into the business of furnishing these services; *so really this makes the situation referred to by the gentleman from California better rather than worse.*

"Mr. Roosevelt. The gentleman from Wisconsin is telling me a bank like the Bank of America can, through a subsidiary corporation, provide these services for itself, then get into competition with other businesses?

"Mr. Reuss. Not through subsidiary corporations. There is a limitation.

"Mr. Roosevelt. As part of the banking service to outside people?

"Mr. Reuss. That is correct. *This limitation improves the situation.*" 108 *Cong. Rec.* 16501 (1962). (Emphasis supplied.)

Those portions of Congressman Reuss' statements printed here in italics make sense only as they clearly imply that Mr. Reuss, a member of the Banking and Currency Committee, believed that the Bank Service Corporation Act restricted *banks,* as well as bank service corporations, from performing data processing services. It must be remembered that the existence of bank service corporations was not permitted at all prior to the 1962 law. So there could have been *no* competition by bank service corporations at the time Mr. Reuss spoke. Thus, when he stated that the 1962 Act would make the situation "better rather than worse" he was obviously referring to a limitation on *bank* activities. When he stated that the limitation in the 1962 Act "improves the situation" he could only have been referring to the existing situation relating to banks. The context of his remarks compels this interpretation. Thus, he must have meant that the 50 percent limitation on services for non-bank businesses at least by implication restricted banks as well as their subsidiary service corporations.

H.R. 8874 as passed by the House contained the provision permitting bank service corporations to perform up to one-half of their services for non-bank customers. Certain Senators on the Banking and Currency Committee expressed grave doubts that this restriction was adequate:

"Section 4 of the bill permits a bank service corporation to perform up to one-half of its services for persons other than banks. In effect, this will enable banks to engage in a nonbanking activity—that of offering computer services and related activities. For many banks this may become a substantial and important business enterprise.

"Generally, banks have been prohibited from carrying on any business other than that of banking. This prohibition, which has been an accepted tradition throughout the banking industry, is grounded upon the conviction that banking is a quasi-public industry. Therefore, the chartering of banks has been subject to Government approval, and the continuing solvency of banks has been zealously guarded by the chartering authority. One of the principal means of guarding that solvency has been by limiting the activities, investment or otherwise, in which banks can engage.

"The purpose of this bill is to exempt from such limitation investment in a bank service corporation. To that we do not object, for we believe that this can and will serve a useful purpose. *However, adequate justification has not been demonstrated for extending this exemption to permit banks to engage in the business of data processing, which this bill permits up to 50 percent of the total activity of a bank service corporation." S. Rep. No. 2105,* 87th Cong., 2d Sess. 10 (1962) (supplemental views of Senators Proxmire, Douglas and Neuberger; emphasis supplied).

Representative Reuss had been of the opinion that prior to the 1962 Act banks *had been allowed* to engage in the data processing business, but that the 1962 Act restricted banks from these activities. The material last quoted indicates that Senators Proxmire, Douglas and Neuberger apparently believed that prior to the 1962 Act, banks *could not lawfully engage* in the data processing business, but that the House version of the 1962 Act allowed banks to enter this business. It does not matter for this case which view was correct (or if either was correct); *the crucial point is that key legislators*

believed that the 1962 Act had operative effects on banks as well as service corporations.[22]

This aspect of the present case involves an attempt to determine whether Congress evinced a legislative purpose to protect data processors from bank competition. Whatever the merits of various congressional views of the substantive law relating to bank power to engage in the data processing business prior to 1962, it is indisputable that a considerable number of legislators, all on Banking Committees, were of the opinion that they were affecting *bank* activities in enacting the 1962 law. So if it should appear that in 1962 Congress intended to protect data processors at all, there is no escape from the conclusion that Congress meant its protection to extend to competition from banks.

There simply can be no doubt that Section 4 of the 1962 Act, as finally passed, was designed to protect data proc-

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[22] "With reference to the prohibition contained in 12 U.S.C. 1864, directed at nonbanking activities on the part of bank service corporations, the following excerpt from the Senate committee report is relevant: *'The bill is not intended as a means to engage in nonbank business, and the committee looks to the bank supervisory agencies* [12 U.S.C. 1865] *to make sure that banks do not organize service corporations for the purpose of entering into businesses other than banking'* (op. cit., p. 4). [Emphasis supplied.]"

"For a national bank to engage directly in the nonbanking activities sanctioned by the regulation manifestly would be at variance with the intent of Congress as expressed in this quoted statement, but it seems reasonable to conclude that the committee was of the opinion that national banks already were prohibited by the term of 12 U.S.C. 24 (Seventh) from embarking upon undertakings not incidental to, or necessary for, the carrying on of the business of banking; and, accordingly, that the restriction contained in 12 U.S.C. 1864 was essential only to prevent indirect evasion of Section 24 through engagement in nonbanking activities on the part of bank service corporations, the agents of the principal. It is inconceivable that the Congress intended to exclude the agent, but not the principal, from engaging in these forbidden activities. As indicated, the failure to include the principal within the express prohibition is understandable only upon the assumption that the Congress was convinced that the principals already had been restricted under previously enacted laws." *Hearings on H.R. 112, 117, and 10529, Before the Subcommittee on Bank Supervision and Insurance of the House Committee on Banking and Currency*, 89th Cong., 2d Sess. 28 (1966) (views of House Committee Staff).

essors. As prevously noted, Senator Proxmire was dissatisfied wth the provisions of the bill allowing up to one-half of service corporation business to be for non-bank customers. He decided to close the door by eliminating the offending clause:

> "Generally, banks have been prohibited from carrying on any business other than banking. Our Federal laws have been careful to restrict them.
>
> . . . .
>
> "This is particularly true because banks have customer lists, and they could offer their customers, for instance, the service of handling their receivables, *which would give the banks a substantial advantage over other legitimate, long established business providing this kind of service.*
>
> "A number of these businesses have informed me and other Senators that *this kind of competition would be very unfair. It would be unfair because the bank could use their own personnel, charge merely the out-of-pocket cost, and the unfair competition could drive businesses now offering this kind of service to the wall.*
>
> *"Those are the reasons why I have offered the amendment.* My amendment would confine these bank service corporations exclusively to servicing themselves and other banks. . . .
>
> "With the adoption of the amendment, I think we are in a position to have a bill that provides what the banks really want, and what the members of the committee feel is justified, and *at the same time safeguard legitimate business enterprises which otherwise might be put out of business."* 108 *Cong. Rec.* 22031 (1962) (remarks of Senator Proxmire; emphasis added.)[23]

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[23]Another expression of congressional intent was as follows: "I join with the Senator in supporting the bill. I think the Senator's amendment is well taken. I think it is advisable to try this situation out at the bank level before we authorize banks to go into competition with other service organizations in providing the type of service contemplated here." 108 *Cong. Rec.* 22031 (1962) (remarks of Senator Bush).

Congress adopted the Proxmire amendment:

> "After much thought, the sponsors of the bill have agreed to accept an amendment to the bill, Senator Proxmire's 9-21-62D, which would limit the activities of bank service corporations to the performance of services for banks." 108 *Cong. Rec.* 22029 (1962) (Statement of Senator Robertson.)

Section 4 of the Act now reads:

> "No bank service corporation may engage in any activity other than the performance of bank services for banks."

The foregoing review of the legislative history of Section 4 of the Act demonstrates a clear congressional purpose to protect data processors from bank competition. Respondents argue, however, that if this Act gives any protection at all, it protects only against competition by bank service corporations and that this protection cannot be extended to give standing to assert illegal competition by banks themselves. But there are overwhelming difficulties with this argument.

First, the legislative history recited above strongly indicates that many legislators were of the opinion that the 1962 Act would protect data processors against competitive bank activity. Whether they were right or wrong in this opinion is a question relating only to the merits of the litigation, but the purpose to give such protection is clear, and this purpose is enough for standing. Respondents have fallen into the error, pointed out in a prior case, of confusing "the merits of the controversy with the standing . . . to litigate them." *Chicago v. Atchison, T. & S. F. Ry.*, 357 U.S. 77, 83 (1958).

Second, respondents take an unduly restrictive view of the already restrictive rules of standing. Their position is apparently based on language in *Hardin v. Kentucky Util. Co.*, 390 U.S. 1, 5-6 (1968), where the Court stated:

> "This Court has, it is true, repeatedly held that the economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured

business to question the legality of any aspect of his competitor's operations. *Railroad Co.* v. *Ellerman*, 105 U.S. 166 (1882); *Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938); *Tennessee Power Co.* v. *TVA*, 306 U.S. 118 (1939); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940). But competitive injury provided no basis for standing in the above cases simply because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury. In contrast, it has been the rule at least since the *Chicago Junction Case*, 264 U.S. 258 (1924), that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision. See *Alton R. Co.* v. *United States*, 315 U.S. 15, 19 (1942); *Chicago* v. *Atchison, T. & S.F.R. Co.*, 357 U.S. 77, 83 (1958)."

Assuming for the moment (although we vigorously dispute the assumption) that the 1962 Act can be carved down to the point where it indicates a legislative purpose to protect only against competition by bank subsidiaries, not banks, there is still no authority for denying standing. In none of the cases cited in the *Hardin* opinion where standing was denied did the claimant assert the existence of a statutory or constitutional provision clearly protecting against competition from a source so closely related to the actual source of the competition as to be virtually indistinguishable. Thus, neither the decision nor the opinion in *Hardin* bars the present petitioners; neither *Hardin* nor any cases cited therein involved a situation similar to that presented here.

The Comptroller for purposes of this case has made an effort to isolate banks and bank service corporations in two separate worlds, with no relationship between them. However, he has taken an entirely different position within the banking community. Despite the clear mandate of Section 4 of the Bank Service Corporation Act, the Comptroller has

ruled in effect that bank service corporations can engage in the data processing business. The Comptroller has ruled with respect to bank service corporations that:

> "such corporations may only perform bank services for banks. Bank services, however, as defined in the Act, would include any service which a bank would ordinarily perform for a customer. Accordingly, if a bank undertakes to handle the payroll accounts or the accounts receivable of a customer, a bank service corporation may perform for the bank the service necessary to enable the bank to fulfill its undertaking." *Comptroller's Manual for National Banks,* par. 7399, 3 CCH *Fed. Banking Law Rep.* ¶59,880D.

The Comptroller's ruling appears to be an obvious attempt to circumvent the restrictions of the Bank Service Corporation Act, but that is not important here. It is important, however, to note that the Comptroller takes the position that the service corporation can engage in the data processing business for non-bank customers on the basis that a bank has agreed to perform these services for its customer. This close interrelationship between banks and their service corporations in *furnishing* data processing services should be recognized when considering the extent of the *protection against the furnishing* of these services.

Petitioners find statutory warrant for their position in the judicial review provisions of the Administrative Procedure Act, 80 Stat. 392 (1966), 5 U.S.C. §702 (Supp. II, 1965-66), which reads:

> **"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."** [24]

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[24]Section 10(a) of the Act originally read as follows:

> "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." 60 Stat. 243 (1946), 5 U.S.C. §1009(a) (1958).

The 1966 changes were not designed to alter the meaning in any way.

A powerful argument can be made that this provision of the Administrative Procedure Act extended the doctrine of *FCC v. Sanders Bros. Radio Station,* 309 U.S. 470 (1940), to all administrative action.[25] However, it is unnecessary to so hold in this case. It is only necessary to find that petitioners were adversely affected or aggrieved by the Comptroller's action "within the meaning *of a relevant statute*" (emphasis supplied). To deny standing in the present case, it must be determined that the Bank Service Corporation Act falls outside the class of laws designated by the term "a relevant statute."[26] In view of the legislative history reviewed previously, it would initially appear unreasonable to assert that the Bank Service Corporation Act is not even "relevant." Further analysis confirms this initial conclusion.

A statute cannot be relevant in the abstract; it must be relevant *to* some other matter or consideration. The matter which the Bank Service Corporation Act must be relevant to is obviously the Comptroller's ruling authorizing banks to engage in the data processing business. The question then becomes one of how closely connected to the Comptroller's ruling the Act must be to be a "relevant" statute.

The legislative history of the Administrative Procedure Act gives no help on this question, as the phrase "within the meaning of any relevant statute" was not elaborated on by the legislators. Professor Jaffe interpreted this provision as limiting standing to actions brought under the particular statute which gives standing to the claimant "or perhaps under closely related statutes." *Jaffe* 530. But the question of *how* closely related still remains.

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[25]See 3 *Davis* 211-213.

[26]As pointed out by the court in *Norwalk Core v. Norwalk Redevelopment Agency,* 395 F.2d 920 (2d Cir. 1968), a "relevant statute" can classify a party as "adversely affected or aggrieved" either explicitly by means of a "persons aggrieved" provision or by implication through a legislative purpose to protect a certain interest. (395 F.2d at 933, n. 26.)

A restrictive interpretation would translate the phrase "a relevant statute" as meaning "the controlling statute" or "the particular statute claimed to have been violated." Such a narrow interpretation might be appropriate when dealing with a criminal statute, but not when construing a remedial law such as the Administrative Procedure Act.[27]

It is not necessary (or perhaps possible) to formulate a general rule establishing for all cases how closely related a statute must be to the matter at issue to be "relevant." All that need be settled in this case is to decide that the Bank Service Corporation Act is "close enough." When the congressional policy to protect data processors under the Bank Service Corporation Act is joined with the congressional policy to provide judicial review as expressed in the Administrative Procedure Act, enough has been shown for standing. Petitioners, after all, are only seeking to reach the merits of the controversy; why should a court strain to avoid hearing the substance of litigation? In close cases, cases in doubt, we submit that doubt should be resolved in favor of proceeding to the merits.[28]

An interpretation such as petitioners here contend for would not, as respondents fear, open the doors to unlimited lawsuits by claimants basing their claims on the theory that *some* statute, somewhere among the laws of the United States, protected them and thus gave them standing. As

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[27]In *Heikkila v. Barber*, 345 U.S. 229, 232 (1953), the Court, in commenting on the Administrative Procedure Act, and the legislative history of the Act pertaining to judicial review, stated as follows:

"The spirit of these statements together with the broadly remedial purposes of the Act counsel a judicial attitude of hospitality towards the claim that §10 greatly expanded the availability of judicial review."

[28]For a sympathetic interpretation in another context of a "party aggrieved" statute, see *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied* 384 U.S. 941 (1966), where the court gave standing to a conservation organization to attack an order of the Federal Power Commission.

Congress has required in the Administrative Procedure Act, the claim would have to be based on a "relevant statute." Such a limitation by no means construes the Act to extend the *Sanders Bros.* doctrine throughout the entire sphere of administrative action.

Although petitioners are not in accord with the opinion expressed in 1946 by the Attorney General that Section 10 "reflects existing law," *S. Doc. No. 248,* 79th Cong., 2d Sess. 310 (1946), the result sought here is not inconsistent with that interpretation. Before 1946 there was no law, statutory or decisional, contrary to petitioners' position that they are protected by a relevant statute. Indeed, there is today no contrary law, save in the Eighth Circuit as a result of this case.

CONCLUSION

Professor Davis has recently deplored efforts by the government to avoid judicial consideration of the merits of lawsuits claiming illegal government action. He requests "*above all, that the system of constant pressure from government lawyers to increase the legal complexities and to close the judicial doors to determinations on the merits should be relaxed.*" Davis, *Discretionary Justice, A Preliminary Inquiry* 159 (1969). He suggests that the executive branch voluntarily waive judicially-created limitations on standing. Petitioners agree that a problem exists but doubt that the system can or should be changed by the executive branch or its attorneys; the system should be changed by the same branch of government which created the "legal complexities." It is for the courts to interpret the restrictive rules of standing so that these rules do not go beyond the reasons for the rules. Such interpretations will not unduly interfere with administrative action. In the long run, administrative agen-

cies can only benefit by reasonable judicial review of their actions.

> "The guarantee of legality by an organ independent of the executive is one of the profoundest, most pervasive premises of our system. Indeed I would venture to say that it is the very condition which makes possible, which makes so acceptable, the wide freedom of our administrative system, and gives it its remarkable vitality and flexibility." *Jaffee* 324.

For the reasons stated, the judgment of the court below should be reversed and the case remanded to the district court with instructions to reinstate the complaint.

Respectfully submitted,

MILTON R. WESSEL
425 Park Avenue
New York, New York 10022

BERT M. GROSS and
FELIX M. PHILLIPS
909 Farmers & Mechanics Bank Bldg.
Minneapolis, Minnesota 55402
Counsel for Petitioners